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15 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
16 IN AND FOR THE COUNTY OF YAVAPAI

17 STATE OF ARIZONA

18 Plaintiff,

19 vs.

20 STEVEN CARROLL DEMOCKER,

21 Defendant.

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2010 JAN -8 PM 3:43 ✓

JEANIE HICKS, CLERK

BY: J. Adams

) No. P1300CR20081339
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) Division 6
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)) **REPLY IN SUPPORT OF**
) **MOTION TO DISMISS OR IN THE**
) **ALTERNATIVE FOR A WILLITS**
) **INSTRUCTION**
)
)

22 The State responds first by admitting (as they must) that the shoe print
23 impressions found behind the crime scene were not made by any shoe associated with
24 Mr. DeMocker, and that as a result he cannot be prejudiced by their complete failure
25 to preserve that evidence for future examination and analysis. Using that logic, the
26 response suggests that a *Willits* instruction would be inappropriate. The Arizona
27 Supreme Court has recently reiterated that in order for a defendant to receive a
28 *Willits* instruction he must show (1) that the state failed to preserve material and

1 reasonably accessible evidence having a tendency to exonerate him, and (2) that this
2 failure resulted in prejudice. *State v. Speer*, CR-07-0103-AP, 212 P.3d 787 (Ariz. 7-
3 24-2009). Here, there can be no serious question with respect to the shoe print
4 impressions that the police had the capability to properly photograph them for future
5 forensic analysis, and to cast them using readily available techniques and materials to
6 permanently preserve them. The State assumes, improperly, that this fact alone
7 should give Mr. DeMocker sufficient comfort without the need for a *Willits*
8 instruction. However, Mr. DeMocker is in fact prejudiced by the destruction of this
9 evidence because it makes it impossible now to ever associate these shoe print
10 impressions with the shoes of any other person who may have committed this crime,
11 or even those who might have just been walking through that area.

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15 This problem is even more apparent following the failure to preserve the
16 bicycle tire impression properly. Unlike the shoe print evidence that the State
17 concedes is not connected to Mr. DeMocker, it seems likely that the State will still
18 attempt to use the tire impressions to show that Mr. DeMocker was riding his bike
19 near the scene that night when they say he committed the crime. Had the police
20 forensically photographed and then cast the impressions, definitive conclusions might
21 have been possible as to whether they were made by the tires on Mr. DeMocker's
22 bicycle. Now, because of the failure to preserve this potentially exculpatory evidence,
23 Mr. DeMocker is unable to show the jury how the impressions differ from those made
24 by his tires, and the State is still able to argue "similarity" between the impressions.
25 Even precluding the State from making such claims is insufficient, because Mr.

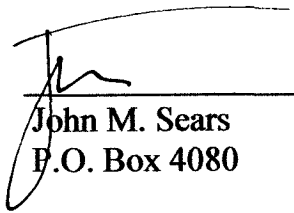
1 DeMocker has lost forever the ability to completely disassociate himself from the tire
2 impressions because of the negligence of the police.

3
4 Finally, Mr. DeMocker believes that the evidence will show that he is entitled
5 to a *Youngblood* dismissal. "[U]nless a criminal defendant can show bad faith on the
6 part of the police, failure to preserve potentially useful evidence does not constitute a
7 denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). The
8 test under the Arizona Constitution is the same. *State v. Youngblood*, 173 Ariz. 502,
9 508, 844 P.2d 1152, 1158 (1993). The critical distinction for constitutional purposes is
10 "between 'material exculpatory' evidence and 'potentially useful' evidence." *Illinois v.*
11 *Fisher*, 540 U.S. 544, 549 (2004) (*per curiam*). *Youngblood* held that "[t]he presence
12 or absence of bad faith for purposes of the due process clause must necessarily turn on
13 the police's knowledge of the exculpatory value of the evidence at the time it was lost
14 or destroyed." 488 U.S. at 56.

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17 There can be no doubt that the police understood that the tire impressions were
18 material and that they could be easily preserved. Their failure to do so is clearly bad
19 faith when coupled with their failure to similarly preserve the clearly exculpatory shoe
20 print impressions that they believed were left by the same individual who rode the
21 bicycle. The net effect is to forever deny Mr. DeMocker the chance to demonstrate
22 that all of the impression evidence was made by others.
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25 DATED this 8th day of January, 2010.

26 By:


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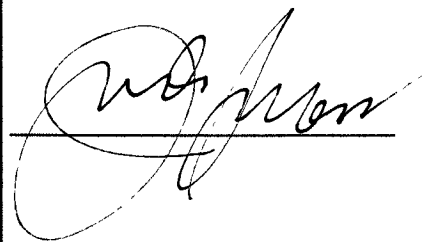
ORIGINAL of the foregoing filed
this 8th day of January, 2010, with:

Jeanne Hicks
Clerk of the Court
Yavapai County Superior Court
120 S. Cortez
Prescott, AZ 86303

COPIES of the foregoing hand delivered
this 8th day of January, 2010, to:

The Hon. Thomas B. Lindberg
Judge of the Superior Court
Division Six
120 S. Cortez
Prescott, AZ 86303

Joseph Butner, Esq.
Office of the Yavapai County Attorney
Prescott courthouse drawer

A handwritten signature in dark ink, appearing to read 'Joseph Butner', is written over a horizontal line.